Richard D. Raskin
rraskin@sidley.com
(*pro hac vice application pending*)
Allison W. Reimann
areimann@sidley.com
(*pro hac vice application pending*)
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, Illinois 60603
Telephone: (312) 853-7000
Facsimile: (312) 853-7036

Ryan M. Sandrock (SBN 251781)
rsandrock@sidley.com
SIDLEY AUSTIN LLP
555 California Street, Suite 2000
San Francisco, California 94104
Telephone: (415) 772-1200
Facsimile: (415) 772-7400

Attorneys for Defendant
QUEST DIAGNOSTICS INCORPORATED

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

COLLEEN EASTMAN, CHRISTI CRUZ, AND CARMEN MENDEZ Plaintiffs, v. QUEST DIAGNOSTICS INCORPORATED, Defendant.	Case No.: 3:15-cv-00415-WHO **QUEST DIAGNOSTICS INCORPORATED'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' COMPLAINT AND [PROPOSED] ORDER** **ORAL ARGUMENT REQUESTED** Hearing Date: May 13, 2015 Time: 2:00 p.m. Courtroom: 2, 17th Floor Judge: Hon. William H. Orrick

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT

TO THE COURT, ALL PARTIES AND COUNSEL OF RECORD: PLEASE TAKE NOTICE THAT on May 13, 2015 at 2 p.m. or as soon thereafter as this matter may be heard before the Honorable William H. Orrick, United States District Court Judge, Defendant Quest Diagnostics Incorporated ("QDI") will and hereby does move this Court for an order dismissing the Complaint for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction pursuant to Rules 8(a), 12(b)(1), and 12(b)(6) of the Federal Rules of Civil Procedure.

QDI seeks an order dismissing all causes of action brought against it in this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

This suit recycles antitrust claims that this Court dismissed three separate times in *Rheumatology Diagnostics Laboratory, Inc. v. Aetna, Inc.*, No. 12-cv-05847-WHO ("*RDL*"). *See* Comparison of *Eastman* and *RDL* Complaints (attached hereto as Exhibit 1). The principal difference between the two cases is that Plaintiffs here allege that they are *consumers* of QDI's clinical laboratory testing services, whereas *RDL* was filed by *competitors* of QDI. But the substantive antitrust theories at issue here are virtually identical to those presented – and thrice rejected – in *RDL*. Further, Plaintiffs' status as consumers dooms their claims under the California Unfair Practices Act ("UPA") and Unfair Competition Law ("UCL") – the only claims that survived dismissal on the pleadings in *RDL*.[1]

The Complaint should be dismissed in its entirety for the following reasons:

First, Plaintiffs lack Article III and statutory standing. Although they claim that they made payments to QDI as a result of co-payment and deductible obligations under their health insurance plans, they do not allege that QDI's conduct had any impact on the *amount* of those payments. Nor is it self-evident that QDI's alleged above-market pricing on fee-for-service business would flow

[1] Citations to Judge Tigar's June 25, 2013 Order (*RDL* Dkt. 85) (attached hereto as Exhibit 2) are abbreviated "6/25/13 Order." Citations to Your Honor's October 18, 2013 Order (*RDL* Dkt. 113) (attached hereto as Exhibit 3) and February 6, 2014 Order (*RDL* Dkt. 146) (attached hereto as Exhibit 4) are abbreviated "10/18/13 Order" and "2/6/14 Order," respectively.

through to Plaintiffs' co-payments and deductibles. Plaintiffs' allegations therefore do not establish any injury-in-fact.

Second, Plaintiffs' monopolization claims contain the same deficiencies as those in *RDL*. At bottom, Plaintiffs object to *competition* itself – specifically, the competitive process by which health care providers offer discounts in return for inclusion in health plans' networks. Plaintiffs offer no facts necessary for this Court to evaluate how competition was unreasonably restricted by the agreements they challenge. Nor do they allege any other viable theory of harm to competition; rather, Plaintiffs recite the same stale allegations of reduction in consumer choice that this Court found deficient in *RDL*. Plaintiffs also fail to allege a plausible relevant market or monopoly power in that market.

Third, Plaintiffs' California state law claims are fatally flawed. As consumers, these Plaintiffs are not parties the UPA is intended to protect, and they have no plausible claim that they have been damaged by conduct the UPA prohibits. Moreover, despite detailed guidance from this Court in *RDL*, Plaintiffs do not plead the basic elements of a UPA claim, including a below-cost sale and the purpose to injure competitors or destroy competition. As for their follow-on UCL claim, that claim fails for the same reasons as their monopolization and UPA claims.

BACKGROUND

A. Parties

QDI provides out-patient laboratory services for patients that are referred to QDI by medical providers. ¶ 12.[2] Plaintiffs Colleen Eastman, Christi Cruz, and Carmen Mendez are three such patients. They contend that, to fulfill co-payment and deductible obligations under their health insurance plans, they made payments to QDI for out-patient routine diagnostic testing services. ¶¶ 33-35. Plaintiffs, however, do not identify the name of their health plans, the type of coverage they

[2] Unless otherwise noted, citations to paragraph numbers refer to paragraphs in the Complaint. (Dkt. 1.)

have (e.g., HMO, PPO, or indemnity), the amount they paid to QDI, or whether that amount was affected in any way by the conduct challenged in the Complaint.[3]

B. Product And Geographic Markets

Plaintiffs assert that there are two relevant product markets at issue in this case, based on two different types of purchasers: health plans/patients and physicians.

First, they assert that there is a product market for "plan/out-patient billing," described as "the market for sales of out-patient, routine diagnostic testing that is billed directly to health plans or out-patients." ¶ 46. This market "also includes the testing services of the competitors of [QDI] to which medical providers reasonably can turn to find substitutes for tests for which [QDI] bills patients and health plans directly." ¶ 47. Such competitors include other commercial laboratories, out-patient laboratories affiliated with hospitals, and laboratories in physicians' offices. ¶¶ 50-51.

Second, Plaintiffs assert that there is a product market for "physician billing," described as "routine diagnostic testing for which laboratories . . . bill medical providers (rather than out-patients or health plans.)" ¶ 52. They further allege that "[t]his product market includes the testing services of the competitors of [QDI] to which medical providers can reasonably turn to find substitutes for tests performed by [QDI]." ¶ 53.

Plaintiffs assert that the relevant geographic market is "Northern California, which includes the counties north of, but not including, San Luis Obispo, Kern, and San Bernardino counties." ¶ 54.

They also claim that QDI's market share "is at least 70% by revenue" in the *combined* plan/out-patient and physician billing markets, ¶ 61 (emphasis added), the same market share alleged for the "Northern California out-patient clinical laboratory market" in the original *RDL* Complaint. *See* RDL Compl. ¶ 74; *see also* Exh. 1 at 11 (citing 73% market share alleged in RDL SAC ¶ 123).

[3] Plaintiff Eastman alleges that she has paid "several thousand dollars" to QDI for testing for herself and her daughter. ¶ 33. She does not, however, provide any detail regarding her payments or allege that that she paid more money as a result of QDI's conduct.

C. Alleged Exclusionary Conduct

Plaintiffs allege that QDI has acquired and maintained its monopoly in the plan/out-patient billing market through three exclusionary practices. Each alleged practice will be familiar to the Court based on its review of similar allegations in *RDL*.

1. *Agreements with Insurers to Narrow Networks*

Plaintiffs allege that QDI has "colluded" with Aetna and Blue Shield of California ("BSC") – the two insurer defendants dismissed from the *RDL* action – "to suppress its competition in the relevant market for 'plan/outpatient billing.'" ¶¶ 20, 25.[4] These allegations are nearly identical to the "network narrowing" allegations underlying the *RDL* complaints.

Plaintiffs allege that QDI has had a "preferred national provider" contract with Aetna since 2000, and that QDI "pushed for a nationwide contract . . . that would have been entirely exclusive to [QDI .]" ¶ 88. Plaintiffs claim that Aetna refused to give QDI exclusivity, but agreed to terminate 400 laboratories throughout the country, including two laboratories in Northern California (Hunter Laboratories and Western Health Sciences Medical Laboratory). *Id.* They further allege that QDI "bargained for right-of-first refusal contracts with Aetna," which require Aetna to contact QDI before entering into a new contract with one of QDI's competitors. ¶ 89. They also claim that Aetna and QDI have created "bonus pools" of funds that are distributed to physician groups after deducting expenses incurred by Aetna for out-of-network testing by QDI's competitors. ¶ 97. And they claim that QDI pays Aetna to "coerce" network physicians not to use out-of-network labs. ¶¶ 92-96.

In the case of BSC, Plaintiffs allege that, in 2008, QDI provided a 10% discount on laboratory tests in exchange for BSC's agreement to exclude two laboratories (Westcliff Medical Laboratories and Hunter Laboratories) from its network. ¶ 101.[5] They allege that after Westcliff was terminated, it went into bankruptcy, and that QDI warned physicians that Hunter, too, would

[4] Plaintiffs do not bring claims based on alleged agreements between QDI and dismissed *RDL* Defendant Blue Cross and Blue Shield Association ("BCBSA").

[5] Plaintiffs also allege that through "contract stacking or blocking" with BSC, QDI is able "to block some or all of its competitors from gaining in-network status." ¶ 105. Plaintiffs provide no detail regarding this practice, and it is not clear to what they are referring.

soon be driven into bankruptcy. ¶ 102. Plaintiffs claim that Hunter exited the relevant market and sold most of its business in 2013. ¶ 103.

These allegations regarding agreements with Aetna and BSC all are materially the same as allegations made in *RDL*. *See, e.g.*, RDL SAC ¶¶ 83, 87, 90, 92, 93, 95, 96 (Aetna); *id.* ¶¶ 99, 101, 109 (BSC); Exh. 1 at 1-6.[6] As in *RDL*, Plaintiffs do *not* allege – nor could they – that QDI is the exclusive in-network provider for Aetna or BSC in Northern California.

2. *Acquisition of Competitors*

Plaintiffs also allege that QDI has "acquired its competitors for plan/out-patient billing in order to eliminate their competition." ¶ 20. Plaintiffs, however, mention only two acquisitions: the acquisition of Unilab Corporation in 2003 (which they note was cleared by the Federal Trade Commission ("FTC")) and of Dignity Healthcare's outpatient laboratory business in 2013. ¶¶ 28-29, 111-114. These allegations also are similar to allegations made in *RDL*. *See, e.g.*, RDL SAC ¶ 121; Exh. 1 at 7.

3. *Below-Cost Capitated Agreements/Pull-Through*

Plaintiffs further allege that QDI has offered customers in the physician billing market below-cost capitated contracts in return for "commitments" by providers to refer to QDI all testing in the plan/outpatient billing market. ¶¶ 20-21, 72. Plaintiffs call such referrals "pull-through," ¶ 22, and claim that the below-cost contracts are "kickbacks," ¶¶ 20-22. These allegations are less detailed variants of otherwise identical allegations made in *RDL*. *See, e.g.*, RDL SAC ¶¶ 61-67; Exh. 1 at 7-8.

D. <u>Alleged Anti-Competitive Effects</u>

Plaintiffs assert that the alleged exclusionary conduct has harmed competition in three ways.

First, they claim that QDI charges "above-competitive" prices in the plan/out-patient billing market. They assert that because QDI "often substantially discounts its prices in the physician

[6] Plaintiffs also allege that Aetna and BSC "assist" QDI by sending payments for out-of-network labs to patients, rather than to the labs themselves. ¶¶ 99, 104. The *RDL* plaintiffs made a similar allegation that Blue Plans sent payments for out-of-network labs to patients. *See, e.g.*, RDL SAC ¶ 35; Exh. 1 at 6-7. Plaintiffs do not allege that this practice is the result of any agreement with QDI.

billing market to well below cost to get pull-through business in the relevant plan/out-patient billing market," QDI "must" add a "monopoly premium" for pull-through testing to compensate. ¶ 117. The *RDL* plaintiffs made similar allegations. *See, e.g.*, RDL SAC ¶ 3; Exh. 1 at 8-9.

Second, Plaintiffs claim that QDI offers "inferior quality," citing fines QDI allegedly paid for faulty parathyroid test results, a recall due to inaccurate Vitamin D results, and a settlement relating to "fraudulent billing." ¶ 118. The *RDL* plaintiffs made identical allegations. *See, e.g.*, RDL SAC ¶ 116-17; Exh. 1 at 9-10.

Third, Plaintiffs claim that QDI has "succeeded in reducing choice for purchasers in the relevant market for plan/outpatient testing" by eliminating competitors. ¶ 119. These allegations also parrot allegations made in *RDL*. *See, e.g.*, RDL SAC ¶ 55; Exh. 1 at 11.

Plaintiffs assert that there are a variety of barriers to competition in the relevant markets, which are nearly identical to the barriers to entry alleged in *RDL*. These include, among other things, physicians' alleged preference to send all of the laboratory business to a single lab, which Plaintiffs refer to as "one-stop shopping." ¶¶ 62-68; *see also* RDL SAC ¶¶ 115, 119; Exh. 1 at 13.

STATEMENT OF THE ISSUES

1. Whether all of Plaintiffs' claims should be dismissed because Plaintiffs have not alleged injury-in-fact and thus lack standing.

2. Whether Plaintiffs' Sherman Act and Cartwright Act claims should be dismissed because the Complaint does not allege (a) harm to competition or antitrust injury; (b) a plausible relevant market; or (c) monopoly power in that market.

3. Whether Plaintiffs' UPA claim, Cal. Bus. & Prof. Code §§ 17043-17044, should be dismissed because Plaintiffs, as consumers, cannot recover damages, and because the Complaint fails to allege below-cost pricing or that QDI acted with the purpose of injuring a competitor or destroying competition.

4. Whether Plaintiffs' UCL claim, Cal. Bus. & Prof. Code § 17200 *et seq.*, should be dismissed because Plaintiffs fail to allege predicate violations of other laws and plead no basis for restitution.

LEGAL STANDARD

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must allege sufficient facts "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "There must be 'more than a sheer possibility that a defendant has acted unlawfully.'" *Id.* However, "a complaint [does not] suffice if it tenders naked assertions devoid of further factual enhancement," *id.*, and the Court need not "assume the truth of legal conclusions merely because they are cast in the form of factual allegations," *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

Due to the substantial cost of discovery in antitrust cases, courts must "[']insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.'" *Twombly*, 550 U.S. at 558. Further, a complaint that fails to plead facts sufficient to establish Article III standing does not state a "plausible" claim for relief under *Iqbal* and *Twombly*, and also should be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1). *See, e.g.*, *Brownfield v. Bayer Corp.*, No. 2:09-cv-00444 JAM-GGH, 2009 U.S. Dist. LEXIS 63057, at *12 (E.D. Cal. July 6, 2009) (finding that plaintiff had not pleaded facts sufficient to show injury-in-fact and therefore complaint was deficient under *Iqbal* and *Twombly*); *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004) ("A suit brought by a plaintiff without Article III standing is not a 'case or controversy,' . . . [and] should be dismissed under Rule 12(b)(1).").

ARGUMENT

I. PLAINTIFFS LACK ARTICLE III AND STATUTORY STANDING

Article III standing is a "jurisdictional prerequisite" to any claim brought in federal court. *See, e.g., Gerlinger v. Amazon.com, Inc.*, 526 F.3d 1253, 1254-55 (9th Cir. 2008). To establish constitutional standing, a plaintiff must allege facts sufficient to establish an injury-in-fact, a causal connection between the injury and the conduct complained of, and redressability. *See, e.g., id.* (rejecting antitrust claims for lack of Article III standing where plaintiff "did not show that he ever purchased an item for a higher price than he would have paid had there been no marketing

agreement and thus has suffered no injury-in-fact"); *McGrath v. Home Depot USA, Inc.*, 298 F.R.D. 601, 610 (S.D. Cal. 2014) (dismissing complaint for lack of Article III standing due to failure to allege injury-in-fact). To meet Article III's injury-in-fact requirement, the plaintiff's alleged injury must be "concrete and particularized" as well as "actual or imminent, not conjectural or hypothetical." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81 (2000). In other words, "a plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him." *Raines v. Byrd*, 521 U.S. 811, 819 (1997).

Injury-in-fact also is required for statutory standing to bring a monopolization claim. *See* 15 U.S.C. § 15 ("Any person *who shall be injured* in his business or property *by reason of* anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . ." (emphasis added)). An antitrust complaint must "allege sufficient facts from which the court can discern the elements of an injury resulting from an act forbidden by the antitrust laws.'" *Cost Mgmt. Servs., v. Washington Nat. Gas Co.*, 99 F.3d 937, 950 (9th Cir. 1996). Only individuals who possess antitrust standing by virtue of having suffered such injury may sue to redress an antitrust violation. *Assoc. Gen. Contractors of Calif., Inc. v. Calif. State Council of Carpenters*, 459 U.S. 519, 529-35 (1983).[7]

A. Plaintiffs Do Not Allege Injury-In-Fact

Plaintiffs' vague allegations that they paid "co-payments" and "deductibles" to QDI are not sufficient to establish that Plaintiffs were injured by QDI's alleged exclusionary conduct. *See* ¶¶ 33-35. Accordingly, the Complaint should be dismissed in its entirety for lack of standing.

Plaintiffs do not allege that they paid more money than they otherwise would have as a result of QDI's conduct. For example, they do not plead that their co-payment obligations, which often are fixed amounts set by the health plans themselves, vary depending on the amount that QDI charges for laboratory tests. For example, if Plaintiffs must make the same $20 co-payment whether QDI

[7] Failure to allege injury-in-fact also is fatal to claims under the UCL. *See, e.g.*, *Spindler v. Johnson & Johnson Corp.*, No. C 10-01414 JSW, 2011 WL 12557884, at *4 n.2 (N.D. Cal. Aug. 1, 2011).

charges $80 or $200 or some other amount, Plaintiffs are not injured. *See Loren v. Blue Cross & Blue Shield of Mich.*, 505 F.3d 598, 608-09 (6th Cir. 2007) (affirming dismissal of ERISA claim for failure to plead injury resulting from allegedly inflated hospital charges, explaining that "individual injury would only be possible if Plaintiffs paid percentage contributions instead of the usual flat-rate co-payment or deductible"). Nor do Plaintiffs plead that their co-payments would have been lower if their laboratory work had been referred to a competitor of QDI. They also do not plead that, due to QDI's "monopoly" prices, they paid more than they otherwise would have toward their deductibles; again, if Plaintiffs would have reached their deductibles regardless of anything QDI did, then they were not injured.[8]

On similar facts, courts have dismissed antitrust complaints for lack of Article III and statutory standing. For example, in *Somerville v. Stryker Orthopaedics*, No. C 08-02443 JSW, 2009 WL 113369 (N.D. Cal. Jan. 16, 2009), the plaintiff asserted Cartwright Act and UCL claims based on allegations of a conspiracy between a hip replacement manufacturer and hospitals and physicians in which the manufacturer paid "kickbacks" to physicians who agreed to use its products exclusively. *Id.* at *1. She alleged that this conspiracy caused her to pay out-of-pocket expenses for hip replacement surgery, and her complaint specified the dollar amount she paid for her hip replacement surgeries. *Id.* at *4. Nevertheless, the court dismissed the claims based in part on the plaintiff's failure to allege whether any portion of the out-of-pocket expenses were attributable to increased costs for hip replacement products due to the misconduct alleged. *Id.*

Similarly, in *Spindler v. Johnson & Johnson Corp.*, No. C 10-01414 JSW, 2011 WL 12557884 (N.D. Cal. Aug. 1, 2011), the court dismissed Sherman Act and UCL claims premised on various supply and distribution agreements that allegedly forced residents of the defendant nursing

[8] Plaintiffs also do not plead that, as a result of QDI's conduct, their health plans raised their insurance premiums. In fact, their own allegations show that such increases are implausible, given that "health insurers in the relevant market do not fully focus on routine testing fees, which typically account for *only about three percent* of their costs for patient care." ¶ 125 (emphasis added). But even if Plaintiffs made such an allegation, they would be barred from bringing their Sherman Act claim under the doctrine set forth in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which bars claims based on overcharges that are passed on to indirect victims of an antitrust violation.

home operator to use drugs manufactured by the defendant drug company. Although the plaintiffs there alleged that they paid specific amounts for nursing home care, including payments for prescription drugs, the court concluded that the plaintiffs lacked standing, explaining:

> Plaintiffs do not allege that J & J's medications that Plaintiffs took cost more than other equivalent medications when they purchased such medications or that the cost of J & J's medications that Plaintiffs took rose as a result of Defendants' alleged anti-competitive conduct. More significantly, Plaintiffs fail to allege that any such additional costs were paid by Plaintiffs, such as by paying increased co-payments. Nor do Plaintiffs allege, as they must, that their out-of-pocket costs for their long term health care increased due to Defendants' alleged conduct.

Id. at *4. Here, Plaintiffs fail to plead any facts that plausibly suggest that their out-of-pocket expenses (if any) increased due the alleged conduct.

Because Plaintiffs' vague allegations of payments to QDI do not plausibly establish Article III or statutory standing, the Complaint should be dismissed in its entirety.

B. Plaintiffs Lack Standing to Bring Claims Based On Alleged Injuries to Health Plans

The Plaintiff consumers allege that, in addition to payments they made to QDI, their health plans also made payments to QDI on their behalf. ¶¶ 33-35. Plaintiffs thus purport to bring claims on behalf of a class that includes both consumers and health plans. *E.g.*, ¶ 40. However, Plaintiffs allege no basis whatsoever to conclude that *they* have been injured as a result of payments made by their health plans. Further, to the extent that they claim that their health plans passed on any injury to the consumers, *see* ¶ 108, those claims run squarely into *Illinois Brick*. *See supra* n.8. Accordingly, Plaintiffs lack the "personal stake in the alleged dispute" necessary to establish standing to bring claims on behalf of the health plans. *Raines*, 521 U.S. at 819.[9] The Court thus

[9] It makes no difference that Plaintiffs bring this case as a class action: "a class representative must be part of the class and '*possess the same interest and suffer the same injury' as the class members*." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (emphasis added); *see also Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("[E]ven named plaintiffs who represent a class must allege and show that they personally have been injured, *not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent*." (emphasis added)). Plaintiffs merely plead that health plans made payments to QDI; they allege no facts that plausibly suggest that the health plans "possess the same interest and suffer the same injury" as consumers who pay QDI only as a result of co-pays and deductibles.

should reject the Plaintiff consumers' attempt to inflate the putative class's damages by piggybacking injuries allegedly sustained by health plans to their own claims.

II. PLAINTIFFS' MONOPOLIZATION CLAIMS ARE DEFICIENT

Plaintiffs' principal claims are for monopolization under the Sherman and Cartwright Acts. As this Court explained in *RDL*, "To establish liability for a monopolization claim, a plaintiff must demonstrate '(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" 10/18/13 Order (Exh. 3) at 23 (quoting *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 480 (1992)). "The test of willful maintenance or acquisition of monopoly power is whether the acts complained of unreasonably restrict competition." *Id.* (quoting *Drinkwine v. Fed. Publ'ns, Inc.*, 780 F.2d 735, 739 (9th Cir. 1985)). In addition, "[a] private plaintiff must also demonstrate antitrust injury by 'proving that his loss flows from an anticompetitive aspect or effect of the defendant's behavior.'" *Id.* (quoting *Rebel Oil Co., v. Atl. Ritchfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1985)). In other words, Plaintiffs must set forth facts, which, if proved, establish "injury to the market or to competition in general, not merely injury to individuals or individual firms." *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 811 (9th Cir. 1985); *see also Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458-59 (1993) ("[The Sherman Act] directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.").

Plaintiffs here, as in *RDL*, have not plausibly alleged any of these elements. Accordingly, their monopolization claims under the Sherman Act and Cartwright Act should be dismissed.[10]

[10] "Because California's Cartwright Act mirrors the federal Sherman Act, the Court analyzes them jointly according to federal law." 10/18/13 Order (Exh. 3) at 13 n.4.

A. Plaintiffs Do Not Plausibly Allege Harm to Competition or Antitrust Injury

1. *Plaintiffs Fail to Plead that QDI's Alleged Discounts to Aetna and BSC or QDI's Acquisitions Unreasonably Restricted Competition*

Plaintiffs devote substantial portions of their Complaint to the same allegations concerning QDI's alleged agreements with Aetna and BSC and QDI's acquisitions of competitors that this Court deemed insufficient to state an antitrust claim in *RDL*. Plaintiffs' monopolization claims should be dismissed for the same reasons as before.

As an initial matter, it is not an antitrust violation for a party to discount its prices in order to obtain in-network status so that it is preferred over its out-of-network competitors – that is not a competition offense, it is *competition*. The antitrust laws approve discounts as pro-competitive. *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 896 (9th Cir. 2008) ("[B]ecause of the benefits that flow to consumers from discounted prices, price cutting is a practice the antitrust laws aim to promote."). Nor it is an antitrust violation to condition discounts on the exclusion of competitors, as the Complaint alleges QDI has done here. The antitrust laws also approve of competition on price and other factors to be selected as an in-network provider. *See, e.g., Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 373 F.3d 57, 62 (1st Cir. 2004) ("[I]f [the health plan] is a competent negotiator, the closed network should lower cost to [the health plan] of supplying drugs to customers (because most suppliers will cut prices in exchange for increased volume)."); *Park Ave. Radiology Assocs. v. Methodist Health Sys., Inc.*, No. 98-5668, 1999 U.S. App. LEXIS 29986, at *12 (6th Cir. Nov. 10, 1999). The inevitable result of competition for in-network status is that some laboratories will be out-of-network – but that does not itself establish harm to *competition*. *See, e.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (the purpose of antitrust laws is the "protection of *competition*, not *competitors*" (emphasis original)).

Rather, for the challenged agreements to constitute monopolization, Plaintiffs must, at a minimum, provide "context against which the Court may evaluate the extent to which competition has been restricted." 10/18/13 Order (Exh. 3) at 24. In *RDL*, the Court dismissed Plaintiffs' Section

2 claims to the extent that they were based on the same agreements because the Plaintiffs "d[id] not describe the dynamics over time of any of the five alleged relevant markets," and "[w]ithin those markets, the plaintiffs d[id] not say how Quest has grown or maintained its market position or how competition generally has fared relative to Quest." *Id.* at 25; *see also* 2/6/14 Order (Exh. 4) at 19 (dismissing claims because Plaintiffs did not allege "the extent of foreclosure, what size each market is, or how the agreement affected each market or its participants' shares").

Plaintiffs' recycled allegations here fail for the same reasons. As in *RDL*, Plaintiffs do not allege how QDI's agreements with BSC and Aetna changed QDI's market position or that of its competitors. *See* 10/18/13 Order (Exh. 3) at 25 (dismissing claims based on Aetna and BSC agreement where plaintiffs failed to plead how "Quest has grown or maintained its market position or how competition generally has fared relative to Quest" as a result of the agreements); 2/6/14 Order (Exh. 4) at 19 ("[W]hile the plaintiffs allege that Quest, LabCorp, and Hunter are participants and the plaintiffs provide their market shares, there is no allegation about how their shares were actually affected by the BSC-Quest Agreement."). Plaintiffs merely allege that, as a result of the challenged agreements, BSC and Aetna each terminated two laboratories from their networks (Westcliff and Hunter, and Hunter and Western Health Sciences, respectively). ¶ 101. But, more detailed versions of the same allegations were insufficient to plead an unreasonable restriction on competition in *RDL*. *See* 10/18/13 Order (Exh. 3) at 18 ("While the FAC alleges that Hunter was Quest's 'largest privately owned competitor operating a full-service laboratory in Northern California' and 'Westcliff was the largest privately owned laboratory in California and Quest's second largest competitor in Southern California,' FAC ¶ 96, this is not enough to show the size of the relevant markets, let alone the magnitude of foreclosure."). "All that can be said [from such allegations] is that three of Quest's alleged competitors were injured, but the antitrust laws are meant to protect competition, not competitors." *Id.* at 19.[11] The Court should reach the same conclusion here.[12]

[11] The Court also rejected, as grounds for finding the Aetna and BSC agreements "exclusionary," allegations of a "right-of-first refusal" agreement with Aetna, "coercion" and "harassment" of

(Footnote continued)

As for QDI's acquisitions, Plaintiffs merely allege that, as a result of the Unilab acquisition in 2003 – which Plaintiffs note that, with certain required divestitures, the FTC cleared – QDI's share of the combined plan/out-patient and physician billing markets rose from 17% to 53%, ¶¶ 29, 113; the Dignity Health acquisition added another 3% to QDI's share, ¶ 114; and, all told, QDI now "has at least a 70% market share" in an unspecified market, ¶¶ 119, 122. But these allegations do not plead how the acquisitions impacted QDI's or competitors' market share in the *specific* relevant markets alleged in the Complaint (i.e., plan/out-patient billing and physician billing), as opposed to the "combined" market or some other unspecified market. Nor do these allegations say anything about nearly half of QDI's alleged growth over a ten-year period. *Cf. United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (the Sherman Act does not punish possession of monopoly power that is derived from "growth or development as a consequence of a superior product, business acumen, or historic accident"). And, as in *RDL*, Plaintiffs plead no other facts that would plausibly establish that these two acquisitions were anti-competitive. *See* 10/18/13 Order (Exh. 3) at 25.

Accordingly, the challenged agreements and acquisitions fail to establish exclusionary conduct or harm to competition, and, as in *RDL*, Plaintiffs' Section 2 claims based on this alleged conduct should be dismissed.

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physicians, and physicians' preference to use a single laboratory for all of their patients, which Plaintiffs nonetheless re-allege here. 10/18/13 Order (Exh. 3) at 21-22.

[12] As in *RDL*, Plaintiffs here also allege no plausible economic incentive for Aetna and BSC – purchasers of laboratory services – to enable a seller of those services, QDI, to restrain competition. *See, e.g., Adaptive Power Solutions, LLC v. Hughes Missile Sys. Co.*, 141 F.3d 947, 952 (9th Cir. 1998) (to survive a motion to dismiss "[a]ntitrust claims must make economic sense."). Plaintiffs claim that the arrangement is plausible because "health insurers cut their short-term losses" through QDI's discounted prices, and they can pass on any above-competitive pricing in the plan/out-patient billing market to its customers. ¶ 108. But Aetna and BSC compete with other health insurers for employer and consumer business. *See* ¶ 25 (alleging that BSC and Aetna "are the third and fourth largest private health insurers in Northern California"). Plaintiffs do not adequately explain why BSC or Aetna would put themselves at a long-term competitive disadvantage for QDI's benefit. As this Court recognized in *RDL*, "courts tend to be skeptical of such claims." 10/18/13 Order (Exh. 3) at 21 (quoting *Stop & Shop*, 373 F.3d at 66).

2. *Plaintiffs' Conclusory Allegations of Higher Prices and a Reduction in Quality and Consumer Choice Do Not Plausibly Allege Harm to Competition or Antitrust Injury*

Having failed to establish impact on the competitive market, Plaintiffs attempt to save their claims by pleading that QDI's alleged conduct nonetheless harms consumers due to: (1) QDI's "above-competitive" prices in the plan/out-patient billing market; (2) QDI's ability to charge such prices in spite of its inferior quality; and (3) reduced choice for purchasers in the plan/out-patient billing market due to elimination of QDI's competitors. These conclusory allegations do not plausibly establish harm to competition or antitrust injury.

First, Plaintiffs' bare assertions that QDI charged "above-competitive" prices in the plan/out-patient billing market are conclusory and therefore implausible. *See Iqbal*, 556 U.S. at 678 ("[A] complaint [does not] suffice if it tenders naked assertions devoid of further factual enhancement."). Plaintiffs do not, for example, plead the "competitive" price for routine laboratory tests or how QDI's prices compare.[13] Instead, Plaintiffs claim that because QDI allegedly discounts its prices below-cost in the physician billing market, QDI "must" charge supra-competitive prices in the plan/out-patient billing market to compensate. ¶ 117. But the allegation that QDI engages in below-cost pricing in one market does not make it more or less probable that QDI engaged in supra-competitive pricing in a separate market in which it allegedly has monopoly power. As the Second Circuit has observed:

> A monopolist presumably always charges the highest available price to maximize its profits without attracting competitors to enter the market. Thus, an antitrust plaintiff asserting that a monopolist defendant engaged in a predatory scheme faces a significant hurdle in showing the defendant raised prices in one market to compensate for losses elsewhere.

Virgin Atl. Airways v. British Airways PLC, 257 F.3d 256, 271 (2d Cir. 2000) (citations omitted); *see also Advo Inc. v. Philadelphia Newspapers*, 51 F.3d 1191, 1203 (3d Cir. 1995) (similar); *Adaptive Power Solutions*, 141 F.3d at 952 ("Antitrust claims must make economic sense."). And, in any

[13] *See, e.g., Intellectual Ventures I LLC v. Capital One Fin. Corp.*, No. 1:13-cv-00740 (AJT/TRJ), 2013 WL 6682981, at *6 (E.D. Va. 2013) (conclusory allegations that defendant "demanded and received 'supracompetitive prices'" were implausible where complaint did not allege specific fees demanded or paid or why such fees were unlawfully supracompetitive).

event, Plaintiffs' allegations that QDI engages in "below-cost" pricing in the physician billing market are wholly conclusory. Accordingly, Plaintiffs' supposition that QDI *must* charge supra-competitive prices in the patient billing market to compensate for below-cost pricing in the physician billing market (which they have not plausibly alleged) must be rejected.

Second, Plaintiffs' claims about QDI's "inferior quality" do not suffice. Plaintiffs rely on the same supposed evidence of QDI's "inferior quality" that failed to carry the day in *RDL*. *See* Exh. 1 at 9-10 (comparing ¶ 59 with RDL SAC ¶¶ 116-117). In any event, to allege an anticompetitive effect, Plaintiffs must claim a "*market-wide* decline in quality of services" in the relevant markets. *Zoellner v. St. Luke's Regional Med. Center, Ltd.*, 937 F. Supp. 2d 1261, 1268 (D. Idaho 2013) (emphasis original). But Plaintiffs do not contend that QDI is the sole provider of laboratory services in Northern California, and they plead no facts regarding the quality of services offered by QDI's competitors. They simply label QDI's quality as "inferior" and "substandard" – which does not plausibly establish a market-wide decline in quality. *See Twombly*, 127 S. Ct. at 1964-65 ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions . . . .").

Third, Plaintiffs' related claim that QDI's alleged conduct has reduced consumer choice must be rejected. As this Court explained in response to the same allegation in *RDL*, "the Ninth Circuit has explicitly held that 'allegations that an agreement has the effect of reducing consumers' choices . . . does not sufficiently allege an injury to competition." 10/18/13 Order (Exh. 3) at 22 (quoting *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1202 (9th Cir. 2012)).

Accordingly, because Plaintiffs do not plead harm to competition or antitrust injury, their monopolization claims must be dismissed.

B. Plaintiffs Have Not Plausibly Alleged Monopoly Power in a Relevant Market

Plaintiffs also must plead "both that a 'relevant market' exists and that the defendant has power within that market." *Newcal Indus., Inc. v. Ikon Office Sol'n*, 513 F.3d 1038, 1044 & n.3 (9th Cir. 2008). Plaintiffs fail to plausibly allege either of these elements.

1. *Plaintiffs' Relevant Product Market Is Implausible*

Plaintiffs contend that there are two distinct product markets at issue in this case: (1) sales of out-patient, routine diagnostic testing billed directly to health plans or out-patients ("plan/out-patient billing"), ¶ 46, and (2) these very same routine diagnostic tests billed directly to physicians ("physician billing"), ¶ 52. Plaintiffs contend that these markets are separate "because the manner in which [QDI] bills for its services is dictated largely by the out-patient's health plan (i.e., by whether the patient is enrolled in an HMO plan)." ¶ 56.

However, Plaintiffs do not allege any differences in the laboratory services provided in the two alleged markets. Instead, they purport to identify different markets based on two different *purchasers* of these products: health plans/patients and physicians. But "consumers do not define the boundaries of the market; the products or producers do." *Newcal*, 513 F.3d at 1045 (citing *Brown Shoe*, 370 U.S. at 325). Thus, "[c]ourts routinely recognize that otherwise identical products are not in separate markets simply because consumers pay for those products in different ways." *FTC v. Lab. Corp. of Am.*, No. SACV 10-1873, 2011 U.S. Dist. LEXIS 20354, at *47 (C.D. Cal. Feb. 22, 2011). For example, in *FTC v. Laboratory Corporation of America*, the court rejected an attempt by the FTC to place laboratory services billed on a capitated basis into a relevant product market that excluded laboratory services billed on a fee-for-service basis, as Plaintiffs attempt to do here. The court explained that "[t]he services provided by clinical labs are identical regardless of payment method," and that "courts . . . have explicitly rejected the notion that various methods of paying for healthcare (HMO, PPO, etc.) are in separate product markets." 2011 U.S. Dist. LEXIS 20354, at *15, *47-48; *see also Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1409-11 (7th Cir. 1995) (HMOs are not in a product market separate from PPOs, because HMOs compete with PPOs for individual and employer business and medical providers can switch between PPOs and HMOs if changes in relative price make one more lucrative than the other).

Plaintiffs here do not claim that consumers lack choice in the type of plan they select. To the contrary, they allege that there are a variety of health plans available on the market. These include HMOs where the physician is billed for patients' lab services, as well as PPOs and other plans where the insurer is billed for the services, with the patient bearing the obligation for co-payments and

deductibles. ¶¶ 5-11, 14; *see also In re ATM Fee Antitrust Litig.*, 768 F. Supp. 2d 984, 997 (N.D. Cal. 2009) (rejecting product market limited to "the provision of Foreign ATM Transactions routed over Star," as distinct from a market for bank deposit accounts, where complaint failed to plausibly allege that customers were "locked-in" to a particular bank's services). Nor do Plaintiffs allege that health plans conceal how laboratory services are billed, or that consumers do not knowingly choose those plans. *See, e.g.*, *Newcal*, 513 F.3d at 1045-46 (relevant product markets defined by product's consumers are impermissible where they are the result of contractual agreements that consumers knowingly agreed to); *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1476 (9th Cir. 1997) (similar), *overruled in part on other grounds by Lacey v. Maricopa Cnty.*, 693 F.3d 896 (9th Cir. 2012).

Accordingly, Plaintiffs' allegations of separate markets for "plan/out-patient billing" and "physician billing" for the same out-patient laboratory tests should be rejected.

2. *Plaintiffs Do Not Plausibly Allege Monopoly Power in a Relevant Market Identified in the Complaint*

Even if Plaintiffs' alleged relevant product markets were proper, they do not plead facts plausibly showing that QDI has monopoly power in either of those markets.

Direct Evidence. Plaintiffs first rely on so-called "direct evidence" of market power – primarily, QDI's allegedly "above-competitive" prices in the plan/out-patient billing market. ¶ 58. However, as explained above, Plaintiffs' allegations that QDI charged "above-competitive" prices are wholly conclusory and depend entirely on Plaintiffs' unsupported and economically implausible allegation that QDI necessarily engaged in supra-competitive pricing in the plan/out-patient billing market to compensate for below-cost pricing in the physician billing market. *See* pp. 15-16, *supra*. And even if Plaintiffs adequately pleaded that QDI charged "above-competitive" prices, nowhere do they allege that QDI has restricted its output, as required to plead direct evidence of market power. *Rebel Oil*, 51 F.3d at 1434; *see also Stewart v. Gogo, Inc.*, No. C-12-5164 EMC, 2013 WL 1501484, at *4 n.3 (N.D. Cal. Apr. 10, 2013) (allegations of supra-competitive prices insufficient to allege

direct evidence of market power where complaint lacked allegations of restricted output). Thus, Plaintiffs' alleged "direct evidence" does not suffice to state a plausible monopolization claim.[14]

Circumstantial Evidence. Plaintiffs' allegations of "circumstantial evidence" of QDI's market power fare no better. To rely on circumstantial evidence, Plaintiffs must: "(1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run." *Rebel Oil*, 51 F.3d at 1434. However, even if Plaintiffs had plausibly defined a relevant market (which they have not), they do not adequately plead that QDI owns a "dominant" share of the market, meaning, in this monopolization case, at least 65 percent. *Image Tech. Serv. v. Eastman Kodak*, 125 F.3d 1195, 1206 (9th Cir. 1997) (quoting *Rebel Oil*, 51 F.3d at 1434).

Here, Plaintiffs claim that QDI has a market share of "at least 70% by revenue" in the *combined* market for physician billing and patient billing. ¶ 61. However, this allegation is utterly conclusory, alleges no facts in support, and appears to have been plucked directly from the Original RDL Complaint. *See* RDL Compl. ¶ 74.

Moreover, Plaintiffs' market power allegations do not match the markets actually alleged in the Complaint. In *RDL*, the FAC alleged that QDI had "an estimated 73% market share of the Northern California physician outpatient market." Because the "Northern California physician outpatient market" was not one of the markets pleaded in the complaint, the Court rejected plaintiffs' market power allegations, explaining that "[t]o state a claim, the plaintiffs must allege 'monopoly power *in the relevant market*,' and not just any market." 10/18/13 Order (Exh. 3) at 24 (quoting *Eastman Kodak*, 504 U.S. at 480) (emphasis in Order)). Plaintiffs make the same mistake here. They do not allege a "combined" relevant market, but rather *separate* plan/out-patient and physician

[14] Plaintiffs also claim that QDI's ability to maintain high market share in spite of its "inferior" quality is direct evidence of QDI's market power. ¶ 59. But this allegation assumes that Plaintiffs have adequately pleaded QDI's market share, which, as explained below, they have not. In any event, as described in Section II.A.2, *supra*, Plaintiffs' allegations of reduced quality do not plausibly establish harm to competition.

billing markets. And while they make perfunctory attempts to allege that, because QDI's share of the "combined" market is 70%, QDI's market share must be "at least" 70% in *each* of the physician billing and plan/out-patient billing markets, ¶¶ 61, 62, 69, these assertions do not "nudge[] their claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 547.[15] Accordingly, as in *RDL*, Plaintiffs' market power allegations should be rejected.

III. PLAINTIFFS DO NOT PLEAD AN UNFAIR PRACTICE ACT CLAIM

Plaintiffs also tack on a claim under the UPA, which prohibits selling a product below-cost or as a loss leader for the purpose of injuring a competitor or destroying competition. Cal. Bus. Prof. Code §§ 17043-44; *Cel-Tech Comm., Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 174-75 (1999). As this Court explained in *RDL*, "[i]n order to adequately plead a claim under the UPA, 'a plaintiff must allege, in other than conclusionary terms, the defendant's sales price, costs in the product, and cost of doing business," as well as the requisite "'desire' to injure competitors or destroy competition." 10/18/13 Order (Exh. 3) at 28-29 (quoting *Fisherman's Wharf Bay Cruise Corp. v. Super. Ct. of the City and Cnty. of San Francisco*, 114 Cal. App. 4th 309, 322 (Ct. App. 2003), and *Cel-Tech*, 20 Cal. 4th at 169).

While the *RDL* Plaintiffs were permitted to proceed with their UPA claim based on allegations introduced in their First Amended Complaint, this Complaint is distinguishable in two important respects. First, the differing identity of the plaintiffs in *RDL* (competitors of QDI) and Plaintiffs here (consumers of QDI's services) is decisive. Plaintiffs are not competitors of QDI, so they cannot plausibly claim to have been damaged by the conduct the UPA prohibits. Second, even if consumers could bring a UPA claim, Plaintiffs here do not muster the allegations necessary to plead a viable UPA claim – despite this Court's detailed guidance in *RDL*.

[15] Plaintiffs cite "the high penetration of managed care in Northern California" and "the pervasiveness of exclusive capitated contracts," combined with the "inducements" QDI offers for pull-through business and physicians' "preference" for "one-stop shopping." ¶ 62. However, these vague allegations provide no basis for parsing QDI's share of the physician billing and the patient/out-patient billing markets alleged here from the 70% share of a "physician outpatient market" that Plaintiffs simply lifted from the *RDL* Complaint.

A. Plaintiffs As Consumers Cannot Recover Damages Under the UPA

As numerous cases recognize, the UPA protects ***competitors***. *See, e.g.*, *Fisherman's Wharf*, 114 Cal App. 4th at 322 ("[T]he prohibitions in the UPA on below-cost sales 'are designed to protect . . . [a *competitor*] whose more powerful neighbor is attempting to drive him out of business.") (quoting *ABC Int'l Traders, Inc. v. Matsushita Electric Corp.*, 14 Cal. 4th 1247, 1261 (1997)) (emphasis added); *ABC Int'l Traders*, 14 Cal. 4th at 1261 ("[A] primary concern in the enactment of the UPA was the protection of smaller, independent retailers, especially grocers, against unfair competitive practices of the large chain stores."); *Bay Guardian Co. v. New Times Media*, 187 Cal. App. 4th 438, 460 (Ct. App. 2010) ("[S]ection 17043 is designed to reach a one-on-one clash between competitors, not just an effect on competition.").

Thus, even if Plaintiffs plausibly pleaded some injury-in-fact – which, as explained in Section I.A, *supra*, they have not – these consumer Plaintiffs cannot contend that they have suffered a "competitive injury" that the UPA compensates with damages.[16] *See, e.g.*, *Fisherman's Wharf*, 114 Cal App. 4th at 330 (requiring plaintiffs to link below-cost pricing to a "competitive injury" and to prove "that the below-cost sales were done 'for the purpose of injuring competitors or destroying competition'"). Indeed, as a general matter, discounts *benefit* consumers, and QDI is not aware of any case in which a *customer*, as opposed to a competitor, was able to prove actual damages under the UPA. *See Leonberger v. Wells Fargo*, No. 13-0114 PJH, 2013 U.S. Dist. LEXIS 89836, at *14 (N.D. Cal. June 25, 2013) (dismissing section 17043 claim brought by homeowner against lender in part because homeowner was not a competitor of lender). At most, Plaintiffs may seek injunctive relief. *See* Cal. Bus. & Prof. Code § 17082; *see also Siechert & Synn v. Apple Inc.*, No. H036402, 2015 WL 513645, at *17 (Cal. Ct. App. Feb. 6, 2015) ("Plaintiffs seek more than injunctive relief here. They also seek actual and punitive damages. They must plead and prove competitive injury."); *Uneedus v. Cal. Shoppers, Inc.*, 86 Cal. App. 3d 932, 943 (Ct. App. 1978) ("In the absence of such

[16] Plaintiffs' failure to plead any injury (much less one causally connected to any below-cost pricing) provides another basis for dismissal of the UPA claim.

proof [of actual damages], treble damages are not permitted and a plaintiff is limited to an injunctive remedy.").

B. Plaintiffs Do Not Plead The UPA's Purpose Requirement

Plaintiffs also fail to satisfy the UPA's "stringent" purpose requirement. *Bay Guardian*,187 Cal. App. 4th at 456. Under the UPA, Plaintiffs must plead that the defendant priced below-cost "for the ***purpose*** of injuring ***competitors*** or destroying competition." Cal. Bus. & Prof. Code § 17043 (emphasis added). "Purpose" means more than intentional conduct or knowledge of a likely effect, but rather that it was QDI's "conscious object" and "positive desire" to "cause the [adverse] result." *Cel-Tech*, 20 Cal. 4th at 173.

Plaintiffs do not allege that QDI's purpose was to injure competitors, but rather that QDI priced below-cost with the purpose of harming ***class members***. *See* ¶ 144 ("Quest's conduct has the purpose of injuring members of the Class . . . ."). However, a purpose to harm consumers is not actionable under the UPA. And even if such a purpose were actionable, Plaintiffs must rely on an attenuated theory of harm whereby below-cost pricing (which generally *benefits* consumers) in one market allowed QDI to charge Plaintiffs above-competitive prices (which are not the subject of the UPA) in another market. As explained above, this theory makes no economic sense. *See supra*, pp. 15-16. Further, Plaintiffs plead no facts to make plausible the highly improbable notion that QDI's "conscious object" or "positive desire" in pricing below-cost in the physician billing market was to *harm* its customers in the plan/out-patient billing market. *Cel-Tech*, 20 Cal. 4th at 173.

Nor do Plaintiffs otherwise allege that QDI acted "for the purpose of injuring competitors or destroying competition." Cal. Bus. & Prof. Code § 17043. While Plaintiffs purport to allege that QDI's below-cost pricing took business from certain competitors, Plaintiffs have not pleaded that this result was QDI's "conscious object" or "positive desire." *Cel-Tech*, 20 Cal. 4th at 173. Mere *knowledge* that below-cost pricing will take business from competitors is insufficient to satisfy the UPA's purpose requirement. *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1154 (9th Cir. 2008). In addition, Plaintiffs' bare allegation that QDI acted with the purpose of "suppressing competition," ¶ 144, without any supporting factual allegations to make such intent plausible, is too

conclusory to save Plaintiffs' claim. Accordingly, Plaintiffs' UPA claim should be dismissed for failure to plead the requisite purpose.

C. Plaintiffs Do Not Plead A Below-Cost Sale

Plaintiffs also fail to plausibly plead a below-cost sale. In spite of this Court's detailed discussion of the below-cost requirement in several opinions in *RDL*, Plaintiffs' allegations of below-cost pricing here are wholly conclusory. Plaintiffs do not allege any of QDI's prices, the costs of any of its services, nor its costs of doing business. *Indep. Journal Newspapers*, 15 Cal. App. 3d at 586-87 (dismissing 17043 and 17044 claims for lack of specific factual allegations as to defendant's costs); *Ameritox Ltd. V. Millennium Labs., Inc.*, No. 8:11-cv-775-T-24-TMB, 2013 U.S. Dist. LEXIS 4005, at *19 (M.D. Fla. Jan. 10, 2013) (dismissing claim under Sections 17043 and 17044, explaining that a party asserting claims under these sections "must allege the sales price, the cost of the product, and the cost of doing business"). Accordingly, Plaintiffs' UPA claim also should be dismissed for failure to plead the "below cost" requirement. *See* 6/25/13 Order (Exh. 2) at 22-23.

IV. PLAINTIFFS DO NOT PLEAD AN UNFAIR COMPETITION LAW CLAIM

The UCL prohibits business acts that are unfair, unlawful or fraudulent. *See* Cal Bus. & Prof. Code § 17200 *et. seq*; *Cel-Tech*, 20 Cal. 4th at 179-181. Plaintiffs rely on the "unfair" and "unlawful" prongs. *See* ¶¶ 136-38. Here, Plaintiffs allege in only the vaguest terms that QDI has engaged in conduct that is "unfair" or "unlawful." *Id.* However, it is apparent that they rely on the same conduct that forms the basis for their monopolization and UPA claims. Because those claims fail, the UCL claim also should be dismissed. *See* 10/18/13 Order (Exh. 3) at 34; 6/25/13 Order (Exh. 2) at 24.[17]

[17] Further, Plaintiffs seek restitution under the UCL but have not alleged facts to show they are entitled to that remedy. *See* ¶¶ 139-40. "[T]he notion of restoring something to a victim of unfair competition," requires that "[t]he offending party must have obtained something to which it was not entitled *and* the victim must have given up something which he or she was entitled to keep." *Day v. AT&T Corp.*, 63 Cal. App. 4th 325, 340 (Ct. App. 1998). The Complaint does not establish a basis for restitution because it does not allege what the Plaintiffs are entitled to that QDI possesses. For this reason, too, the UCL claim must be dismissed. *See, e.g.*, *In re High-Tech Emp. Antitrust Litig.*,

(Footnote continued)

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed in its entirety.

Dated: March 16, 2015

Respectfully Submitted,

SIDLEY AUSTIN LLP

By: /s/ Ryan Sandrock
Ryan Sandrock
Attorney for Defendant

QUEST DIAGNOSTICS INCORPORATED

856 F. Supp. 2d 1103, 1124 (N.D. Cal. 2012) (dismissing a UCL claim for failure to plead grounds for restitution).

Richard D. Raskin
rraskin@sidley.com
(*pro hac vice application pending*)
Allison W. Reimann
areimann@sidley.com
(*pro hac vice application pending*)
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, Illinois 60603
Telephone: (312) 853-7000
Facsimile: (312) 853-7036

Ryan M. Sandrock (SBN 251781)
rsandrock@sidley.com
SIDLEY AUSTIN LLP
555 California Street, Suite 2000
San Francisco, California 94104
Telephone: (415) 772-1200
Facsimile: (415) 772-7400

Attorneys for Defendant
QUEST DIAGNOSTICS INCORPORATED

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

COLLEEN EASTMAN, CHRISTI CRUZ, AND CARMEN MENDEZ Plaintiffs, v. QUEST DIAGNOSTICS INCORPORATED, Defendant.	Case No.: 3:15-cv-00415-WHO **[PROPOSED] ORDER GRANTING QUEST DIAGNOSTICS INCORPORATED'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT** **ORAL ARGUMENT REQUESTED** Hearing Date: May 13, 2015 Time: 2:00 p.m. Courtroom: 2, 17th Floor Judge: Hon. William H. Orrick

[PROPOSED] ORDER

Defendant Quest Diagnostics Incorporated's motion to dismiss is granted, and Plaintiffs' Complaint is dismissed for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction pursuant to Federal Rules of Civil Procedure 8(a), 12(b)(1), and 12(b)(6).

IT IS SO ORDERED.

Dated: _____, 2015

_____

HONORABLE WILLIAM H. ORRICK
United States District Judge